ECONOMIC ASPECT OF THE RECENT DECISIONS OF THE UNITED STATES SUPREME COURT ON TRUSTS[1]

Legal aspect.—The legal aspect of the decisions in the cases of the Standard Oil Co.[2] and of the American Tobacco Co.[3] is not under consideration. Presumably the decisions are sound from that viewpoint. At any rate, the fact that the decisions are by the Supreme Court make them good law. In the interest of the public it is important that our laws be also considered from the economic viewpoint.

Points in advance.—These decisions mark two substantial steps in advance.

a) It was made clear that restraints of trade are forbidden by the Sherman Anti-Trust law, only when they are unreasonable, i.e., only when they are "operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade."

b) The court recognizes and emphasizes the need of adjusting the meaning of the terms of the law to changing business conditions, either by statute, or, in case of need, by decision of the court.

Did the court follow these principles?—From the economic viewpoint we need carefully to consider whether the court followed these two principles which it has itself laid down.

a) Did these decisions show that the judges kept clearly in mind the real public interests from the viewpoint of economic opinion of the present date?

b) Did the court fully recognize the changes in our economic conditions within the last thirty years, so that it rightly interpreted the probable "intent" of the managers of these great corporations and saw clearly the "public interests"?

c) Did the court, granting that it saw clearly the evils to society from the acts of these corporations, lay down in the decisions the right remedies for these evils?

[1] A paper read before the Western Economic Society at Chicago, March 1, 1912.

[2] 221, U.S., 1. [3] 221, U.S., 106.

The court's assumptions regarding economic principles.—

a) As a basis for these decisions, and for the remedies proposed, the court assumed that under all circumstances, to monopolize, even partially, or to intend to monopolize any industry, is and must be injurious to the public interests. President Taft also, in his message to Congress, made a similar assumption. The character of the industry seemed not to be in question: the same principle would apparently apply to a natural monopoly, like a railroad or a pipe-line, as well as to a manufacturing corporation. The President even cited the Northern Securities case as one in point. The court, even when laying down in its decision the "rule of reason" by which it should be guided, saying that it was to decide whether there was restraint of trade to an injurious extent, seemed to assume that monopoly is and necessarily must be injurious to the public interests.

b) The court also assumes that competition in trade (unless it is "unfair" and carried on with the intent to secure a monopoly) is invariably in the "public interest."

c) Finally, the court assumes that the best remedy for monopoly that is injurious to the public is to attempt so to reorganize a great monopolistic corporation as to promote competition. It is proposed to do this by separating the great corporation into a number of smaller corporations, which the court assumes will compete with one another, even though the ownership of the stock of the different corporations should remain in the same hands. It will appear to many that even if in the cases before the court it should appear to be clearly established that the acts of these great corporations had been injurious, and that they were monopolies acting contrary to the public interest, the best remedy for the evils might possibly have been different from that suggested by the court.

Care needed in use of terms.—To test these assumptions made by the court it is essential that we get a clear conception of the meaning of the expression "public interest." We must be careful not to be misled by the traditional attitude of most people toward monopoly or socialism, nor should we be influenced by the attractiveness of the ideas ordinarily brought to mind by the expressions "freedom of competition," "freedom of opportunity." Any one of

these things may be either good or bad for the public. It all depends upon the special circumstances of the cases in question. Such legal monopolies as the post-office, the coinage of money, are universally recognized as in the public interest. In certain states the monopolization of the telegraph, the telephone, the railways, is considered in the public interest. In many European countries gold, silver, coal, whenever and wherever discovered in the mines, are recognized as state property, and they can be taken out of the mine only under a state license, which may still grant a private monopoly.

Probably most historians are of the opinion that in ancient Sparta, whose purpose was to create and maintain a military type of civilization, socialism was in the public interest so long as militarism remained the purpose of the state. That is no sign that socialism would be in the public interest in one of our great industrial states of the present day.

Freedom of competition in letter-carrying would be generally considered an evil. Those of us who live in cities where there is more than one telephone system are inclined to the opinion that monopoly in telephones might well be more in the public interest than competition, provided the monopoly were properly controlled. Freedom of opportunity is presumably a benefit to the public if it is limited to people who are worthy and whose intentions are benevolent; but freedom of opportunity may well be looked upon as injurious to the public, if it is extended to people who are unscrupulous and whose purposes are selfish.

We need, therefore, to be carefully on our guard, to prevent ourselves in the discussion of important questions from being misled by our ordinary use of words. Each expression needs to be tested in its application to the specific case under discussion.

"*The Public Interest.*"—When we consider the public interest we should have in mind the interest of the community as a whole, the interest presumably of the great masses of the people in distinction from the interest of the few, provided there is any conflict.

a) Institutions or industrial processes that bring about a higher standard of living for the great masses of the people are presumably in the public interest. Through the improvement of economic

conditions we are likely most easily to secure also an improvement in the mental, and even in the moral conditions of the people. Inasmuch, therefore, as we are considering here the economic aspect of these decisions, it is proper for us to assume that the economic welfare of the community is in the public interest.

b) Economic progress in any community comes from the best utilization of industrial energy. Whatever tends to save industrial energy, or to promote industrial efficiency, is in the direction of progress, and is, other things equal, in the interest of the public. Economic progress implies also the best diffusion of wealth, the best distribution of wealth among the people. To put the matter in another way, whatever tends to improve the standard of living of the masses is presumably a step in economic progress. We should consider monopoly and competition in these various relations.

The class of monopoly considered.—In the early days of English statutes and court decisions regarding monopolies, the monopolies under consideration were legal monopolies—exclusive control granted by the Crown. At the present time in the United States such monopolies, except in the case of patents, are not under consideration. There are so-called natural monopolies, the railways, the street railways, certain mines, such as nickel mines, potash, tin mines, etc. There is doubtless a certain element of natural monopoly in part of the business of the Standard Oil Co.; for example, the transportation of oil by the pipe-lines and, in a very slight degree, the production of the crude oil from the oil wells. A relatively small proportion, however, of the oil wells are owned by the Standard Oil companies, and whatever monopolization of the crude oil by the Standard Oil Co. has taken place has been brought about by its control of either the pipe-lines or the refineries. In both cases it was not the element of natural monopoly, but that of the monopoly coming through great capital and the use of the power of capital, that was under consideration by the courts.

Free competition tends toward monopoly.—Under a system of free competition industrial efficiency tends toward monopoly. The business genius whose industrial efficiency is greatest tends to overcome his rivals, and to take over a continually increasing proportion of the business, until he becomes a monopolist.

Savings of combinations.—The savings of a large combination which may or may not be a monopoly has been so often shown in so many different directions, that I need not dwell upon this point at length. A few examples will suffice:

There are great savings in freight, through the opportunity of supplying customers from the nearest points and avoiding cross freights. The Standard Oil Co. has legally saved large sums in this way. Mr. Gates testified before the Industrial Commission that the savings in this direction by the American Steel & Wire Co. amounted to not less than $500,000 a year.

A great combination saves much in avoiding competitive advertising. The more nearly a monopoly is established, the greater is this saving. In the early days of the American Tobacco Co. it was estimated that in this way alone the saving was $3,000,000 a year. A monopoly may advertise extensively to extend its trade and to increase consumption of its goods. Competitive advertising often does not increase trade largely, but only determines from which dealer the consumer shall buy. The distinction between these two kinds of advertising should be carefully noted.

Large sums are saved through the need of fewer salesmen. The Steel & Wire Co., when formed, took off 200 traveling salesmen. The great whiskey combination discharged 300 salesmen. The head of the one of the great whiskey combinations estimated that in the competitive system, between the distiller and the consumer, $40,000,000 a year was spent that might be saved by combination.

A conservative estimate gives the saving that the meat-packers might make by a well-organized combination that could do business openly, through good established markets, common salesmen, common delivery wagons, etc., as not less than $25,000,000 per year.

The fact that the American Sugar Refining Co. could supply any demand of all of its customers for all qualities of sugar without trouble was estimated to give that company an advantage of not less than $\frac{1}{16}$ of 1 cent a pound.

The saving made by having different steel mills, each giving its whole time to one type of product, thus easily adapting the supply of various types of steel bars to the demand without change

of rolls, was estimated by President Guthrie of the American Steel Hoop Co. to save not less than $1 a ton.

The ability that a great company has to run its best plants at full speed all of the time, and to use only one or two plants in such a way as to adjust the supply to the varying demands of the market, effects likewise great savings. The American Sugar Refining Co. estimates its savings of this kind at not less than $\frac{1}{8}$ cent a pound on its entire output.

This ability to adjust the supply to the changing demands of the market so as to maintain a steady, fair price instead of greatly fluctuating prices sometimes very high, sometimes abnormally low, is the justification usually given for at times selling a surplus stock at lower prices abroad than at home and even for buying up a rival plant in order to dismantle it.

It is entirely possible that either act might, under special circumstances, be fully justifiable and in the public interest, although presumably in most cases they would both be contrary to the public interests.

These savings of combination make monopoly possible.—All of these facts that have been given—and that they are facts cannot well be questioned—justify the assertion that in very many cases the great combinations are able to charge monopoly prices, prices too high to be in the public interest, only because it is possible for them to produce their product cheaper than well-equipped rivals, and to destroy their competitors if they wish, by setting prices below the cost of profitable production for those rivals.

A similar line of reasoning, which could be substantiated by a citation of similar facts, would show that the control of the various elements that enter into the manufacture of the products of some of these great combinations might well effect a saving of industrial energy and a promotion of industrial efficiency beyond that which could be brought about by the separate ownership, control, and management of these various elements. For example, ownership by the Tobacco Co. of establishments able to supply it with all the tin-foil, licorice, packing cases, and other like elements needed, might well serve, not only as a barrier against others entering into the tobacco trade, but also as a means of promoting its own indus-

trial efficiency. The same conditions exist with reference to the ownership by the United States Steel Co. of iron mines, coal mines, steamship lines, railroads, and other elements essential for the cheapest production of steel.

Too fierce competition may injure the public.—Fierce competition also, among establishments that have fixed capital invested in very large sums, may well result in losses to practically all parties concerned, and eventually, in consequence, to the detriment of the public. There is good reason to believe that such a condition of affairs existed in the days immediately preceding the organization of the sugar, tin-plate, harvester, and some other of the great combinations. It might well be, therefore, that the series of facts relied upon by the Supreme Court in the tobacco case, to show conclusively wrongful purpose and illegality of combinations, might show simply a desire to promote industrial efficiency. I do not assert that this is the fact in the case under consideration, but simply that, from the economic viewpoint nearly—not quite—all of the conditions cited by the court to justify its conclusion might reasonably be interpreted in an entirely different way.

It seems, therefore, to be clearly established that great combinations, even though they be monopolies, can effect greater saving of industrial energy than is possible to separate companies, however large they may be, provided they own only one plant; moreover, that there is a decided saving in the lines of competitive advertising, selling, and in some other ways that a monopoly may effect, which is not possible under competition.

Effect of combinations on prices.—The fact that a combination or monopoly can make lower prices than separate establishments running under a competitive system does not establish the further point that the great combinations have made lower prices. In my own judgment, up to the present time in several lines of industry, the combinations have rather raised prices than lowered them.[1] In certain lines of industry the combinations have steadied prices; in other lines this cannot be shown. Even if it were shown that prices are somewhat higher, that in itself is not sufficient to show

[1] Professor Meade's paper and chart indicate that the combinations taken as a whole have probably slightly lowered prices.

that the community has been injured by the combination, although it is fair to assume that the higher prices are against the interests of the public. In order to establish a public injury, however, it would be necessary to take up the question of the use made by the monopolists on the one hand, or by the consumers on the other, of the savings made by the monopolists or the consumer, as the case may be. This is not the place for such a discussion. The one point that should be emphasized is that the industrial energy saved is in itself a benefit to the public. The further question of the use to be made of the savings would concern the remedy for the evils of monopoly, and not the method of production.

The effect of combinations on competitors.—In most of the discussions on monopolies great emphasis is laid on the fact that combinations drive other competitors out of business, or buy them up at low rates. The fact that the competitive system, even when the number of competitors remains very large, results also in the failure of a large proportion of the competitors, is usually ignored. The fact, however, remains that though the number of competitors is large, failures of the incompetent, or of the less well situated, or of those with small capital are very frequent in all lines of business, and that their creditors suffer as much, and quite possibly more, than the creditors of those bought up by the great combinations.

Moreover, it is under the system of the fiercest competition that we are most likely to find the great evils coming from child-labor, women's labor, lack of attention to the prevention of industrial accidents, and similar evils. An unscrupulous competitor may well force his rivals to adopt methods of business against which they would revolt were they not under the pressure of competition.

Effects of combinations on personal initiative.—It is often assumed that under the system of industry controlled by the great combinations, there is a crushing out of individual initiative on the part of working men of different grades. This point has, however, in my judgment not been established. Every great business is seeking for men with originality and power, and the supply is always very limited. In a great establishment the men at the heads of departments are always encouraged to think out new

plans, and they are given great leeway in their methods of work so long as they show good results. Often prizes are offered to even the unskilled workers for suggestions of improvement, and the surest way to secure promotion is to furnish new ideas. The competition of the men in different establishments of a combination, or of men of the same grade in the same establishment is perhaps often fiercer than that among managers of entirely independent plants. Their promotion depends upon their success. Moreover their competition is more intelligent, as the records kept at the main office show exactly the point at which each man surpasses or falls behind his rivals. A man does not fail of promotion without knowing just the point at which he has failed, whereas the independent manufacturer who is forced into bankruptcy knows simply that he has failed to make profits; he does not know the exact reason for his failure.

The wage-earner.—If what has been said about the saving of industrial energy is true, and in my judgment the facts along the lines indicated cannot be controverted, there is a possibility, under the combinations, of paying better rates of wages than under the competitive system. There can be no question that some of the combinations have paid low wages. It probably would be impossible to show that in any industry the wages paid by the combinations are lower than those paid by their independent rivals, and there are well-known instances where the combinations have raised wages beyond the rates paid before the combination was made. The point to emphasize, however, whether the combinations in fact have raised or lowered wages, is that the savings of industrial energy, and of greater efficiency would permit the increase of wages without increasing prices.

The remedies.—The remedy for the evils of the combinations applied by the Supreme Court, and approved by President Taft in his annual message, is to attempt to force the combinations to return to the competitive system by dividing them into parts. It will be a failure if the separate parts divide territory or make price agreements. That would not be competition. It has been the judgment of many persons—lawyers, economists, business men—that these decisions cannot be enforced as a matter of fact. It has

been thought that, although there might be a reorganization in form, they would still remain combinations in fact. A somewhat similar procedure followed the dissolution of the Standard Oil trust, the Sugar trust, and the Whiskey trust years ago. It did not affect at all the question of monopoly. It seems probable that the present decisions will be equally ineffective. The dividends and prices of stock of the various Standard Oil companies since the decision seem to justify these judgments. If, however, we were to grant that the division of these great combinations into separate smaller corporations would result in actual competition, we should still question whether the remedy were in the public interest. If the contentions just made are true, the application of this remedy must result in a loss of industrial efficiency, and that in itself is contrary to the public interest. The only question that could remain is whether that loss of efficiency is an evil less than the evil of combination. That the loss of industrial efficiency is in itself an evil there can be no question.

Railroad competition.—President Taft cited the decision in the Northern Securities case as one that had been beneficial. A prominent shipper in the Northwest lately said to me that in his judgment the effect of that decision was this: Had the Northern Securities case been decided differently, the three railroads in question would have been under the control of a board of directors that would doubtless have been influenced by Mr. Hill. At the present time it was the opinion of the shippers in that region that these three roads were now dominated by Jim Hill alone.

There can be no doubt that with our separate railroads there is competition at certain points, such as Chicago, St. Louis, New York, Detroit, Philadelphia. This competition is of course at the present time more or less regulated by the Interstate Commerce Commission, with the hearty approval of the railroads themselves. If all of the railroads of the United States were under one management, as the President intimated might have been possible, it is fair to ask whether the government, through the Interstate Commerce Commission, might not bring about a system of railway rates that would be more in the interests of the public than are the present rates. Is it just and in the public interest that the rates

at competing points should be kept abnormally low, when in consequence the rates at non-competing points must be kept abnormally high in order that the roads may keep out of the hands of receivers?

A noteworthy Missouri decision.—The Supreme Court of Missouri, in October, 1911, made a decision in the case of the International Harvester Co. of America.[1] This decision practically said that the Harvester Co. had technically violated the anti-trust law of that state, but that by its acts within that state it had injured neither its competitors by unfair methods of competition nor the public by any undue increase of prices. It therefore entered a judgment of ouster, but suspended the execution of that judgment, provided the Harvester Co. would cease the technical violation of the law, and would continue this practice of fair treatment of its competitors, and of the public. The court thereby practically recognized the economic benefits to the public of this combination, and provided that the combination might continue to exist and do business in Missouri so long as its methods of doing business were to the interest of the public.

Could the method be employed elsewhere pending legislation?—Does not this decision suggest the proper method of procedure against the great combinations either by states, or by the federal government, instead of the method of attempting to enforce competition with the certain waste of industrial energy? Ought not our government by legislation to permit the existence of these combinations, and to provide such a supervision of their business methods that there shall be saved to the public their industrial efficiency, while also providing that the power of the combinations should not be used against the interests of the public? Until such laws shall be passed, would it be practicable for the Supreme Court of the United States, in the event of the establishment of injurious practices on the part of interstate combinations, still to permit these combinations to exist, but to forbid them, by injunction, to continue these injurious practices, and to compel them to carry on their work under the general oversight of the judiciary department,

[1] *State ex informatione Attorney-General: E. W. Major, relator,* v. *The International Harvester Company of America, respondent,* No. 14,546.

with the understanding that further violation of the laws would result in a receivership with the administration under the direction of the court, until a proper method of supervision can be provided by law?

The decisions economically unwise.—The essential purpose of this paper, however, is not to suggest remedies, but rather to call attention to what seems to be the fact, that the Supreme Court in these two decisions has failed to take sufficiently into account the economic benefits that come from the saving of industrial energy and the promotion of industrial efficiency by industrial combination. Even though it may have justly estimated the evils coming from some of their business practices, in its remedies it is directly attempting acts that must result in loss of industrial energy and lessening of industrial efficiency. This is clearly an economic injury to the public, directly contrary to the public interest. It is submitted that a method of procedure should be found, either by the legislative department or by the courts, that, while protecting the public interest from direct harm, shall serve the public interest by keeping the benefits of combination.

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